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CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 578

ALICE ASCHENBRENNER,
Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

ALLEN G. WRIGHT,
Mills Building, San Francisco,
Attorney for Petitioner.

RANDELL LARSON,
WRIGHT & WRIGHT & LARSON,
Mills Building, San Francisco,
Of Counsel.

Court of Appeals for the Ninth Circuit in a proceeding therein entered June 26, 1933; reversing the judgment of the District Court, Northern District of California, Southern Division, after a trial by jury. (R. 83-4). A petition for a rehearing was denied by the Circuit Court of Appeals on September 6, 1933. (R. 85.)

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 65 Fed. (2d) 976. It is included in the record at pages 65 to 83.

THE CASE.

Petitioner sued respondent on a policy of accident insurance in which her husband was the insured and she was the beneficiary. The policy provided for a principal payment in case of loss of life resulting from accidental bodily injuries, and for double indemnity in the following language:

> "The amounts payable in all the foregoing schedules shall be double if 'such injury' is sustained by the insured,
>
> (1) While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service." (R. 4.)

The insured, who, it was conceded, had a railroad ticket in his pocket, jumped on a train after it had

started. He stood with both feet on the lower step of the car and inside the vestibule. While so standing he was brushed off by another person, sustaining injuries from which he died.

At the trial in the District Court respondent conceded the accidental death and its liability for the single indemnity. A trial by jury resulted in a verdict for double indemnity. (R. 7.) Judgment was entered by the District Court in conformity with the verdict. (R. 8.) The Circuit Court of Appeals reversed the judgment of the District Court, and remanded the case with instructions to enter a judgment for a smaller sum, the amount of the single indemnity. (R. 83-4.)

CONSTITUTIONAL QUESTION.

The Circuit Court of Appeals in setting aside the verdict of the jury, assuming to pass upon the issues of fact, and directing a judgment for a lesser amount, notwithstanding the verdict, violated the provisions of the Seventh Amendment to the United States Constitution, which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Under the provisions of this amendment to the Constitution, as interpreted by this court, the Circuit Court of Appeals was prohibited from directing a

judgment, notwithstanding the verdict, based upon its own determination of the facts of the case. In doing so it presumed upon the prerogatives of the jury, and violated the right guaranteed by the Constitution.

In setting aside the verdict of the jury, or the judgment of the trial court, for errors of law committed at the trial, the Appellate Court may not re-examine the facts and render its own verdict, but must order a new trial.

Slocum v. New York Life Insurance Co., 228 U. S. 364, 33 Sup. Ct. Rep. 523;

Fidelity Title & Trust Co. v. DuBois Electric Co., 253 U. S. 212, 40 Sup. Ct. Rep. 514.

See also:

Glynn v. Krippner (C. C. A. 8), 60 Fed. (2d) 406.

OTHER QUESTIONS PRESENTED.

In addition to the constitutional question presented in this petition, the decision of the Circuit Court reversing the judgment of the District Court for alleged errors of law committed at the trial, considered on its merits, presents the following important questions:

1. Should double indemnity provisions of accident insurance policies be construed in accordance with the same principles of law applicable to other provisions of the policies, and

2. Is the word "passenger", as used in the policy, limited to the strict, technical definition announced in public carrier cases where claims for negligence, based

on the failure to exercise that high degree of care owing a passenger by a public carrier, are involved, or should the word "passenger", as used in the policy, be construed, as other terms of the policy, in its plain, ordinary, and popular sense?

THE FACTS OF THE CASE.

The facts, as stated by the Circuit Court of Appeals, are, in part, as follows:

On the morning of October 29, 1931, the insured and a friend, Mr. Ishem, arrived at the Southern Pacific Railway station in Burlingame, California, in a taxicab. The cab drew up at a distance of 25 to 40 feet from the train, which was just commencing to pull out of the station. The insured and his companion commenced running for the train across the station platform, somewhat on a diagonal. Ishem was on the left (toward the front end of the train) and a little ahead. When the two men reached the train, it was moving at a rate of speed estimated at from seven to ten miles an hour. The vestibule doors were open. The insured jumped upon the lower step, his right hand grasping the handrail, and while standing there he was carried to where Ishem stood. The Circuit Court stated:

> "The cause of the accident, as indicated by the testimony of three of the witnesses, was that as the train moved forward, carrying the decedent [insured] to the point where Ishem stood, the decedent's overcoat or the small part of the decedent's body outside of the vestibule, brushed

against Ishem and caused the decedent to loose his hold and fall. From the time he jumped on the train until he was carried to the point where Ishem stood, the decedent was standing with both feet on the lower step of the car and inside the vestibule, except for a small part of his body, which was outside. The decedent was carrying his overcoat over his left arm and a brief case in his right hand. After he was on the step he 'apparently started to change hands with his overcoat or brief case'." (R. 67.)

THE CONSTRUCTION OF THE CONTRACT BY THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals, conceding a conflict in the authorities, applied to the word "passenger" in the insurance policy the strict, technical construction of public carrier cases. It held, that before the insured could bring himself within the terms of the insurance contract, it was not sufficient that he stand on the steps, or running board, or platform of the conveyance, but he must first have reached "a place of safety", as defined in negligence cases against carriers. The citations and quotations relied upon in the Circuit Court's opinion define such "a place of safety" as the "inside of a car". For example, White (Personal Injuries on Railroads), as quoted by the Circuit Court, states:

> "Nor does a person become a passenger, who gets on a train after it has started to move, until he actually reaches a place of safety inside the car." (R. 75-6.)

In determining the limitations of the double indemnity clause of the policy, the Circuit Court of Appeals quoted authoritatively the following:

> "The theory of this clause [double indemnity] is that the interior of a passenger car is a place of exceptional safety, and in view of the slight risk to one seated there, the insurance company can contract to pay a double indemnity in the event of injury or death." (R. 80-81.)

and announced that the above quoted "observations regarding the *reason* for the rule—namely, that a passenger is in an exceptionally safe situation—are in point here". (R. 81.)

To so limit the word "passenger" as used in the policy to a person "in an exceptionally safe situation" is wholly to negative the language of the policy "including the platform, steps, or running board". The insurance company inserted that language in its policy with the purpose of assuming a broader obligation than would have rested upon it had that language been omitted.

THE POLICY BROADENS THE MEANING OF THE WORD "PASSENGER".

The language inserted by the insurance company in its policy extended the coverage beyond the "zone of safety" defined in negligence cases against carriers. The language of the policy, "while a passenger *in* or *on* a public conveyance (including the *platform, steps,* or *running board* thereof)" broadened the meaning

of the word "passenger" beyond the technical "place of safety" limitation adopted in carrier cases.

The Circuit Court relied primarily on a rule announced in Cooley's Briefs on Insurance, which the opinion quotes as follows:

> "Policies usually provide for the payment of double indemnity if the injury causing disability or death is received under certain specified conditions. One of the most common provisions is one that provides for double indemnity if the injury is received while riding as a passenger in any conveyance intended for the transportation of passengers. In determining who is a passenger within such a clause, the same rules are applied as would govern if the action was (were) against the carrier." (R. 70-71.)

But the rule stated by Cooley was confined to policies reading "while riding as a passenger *in* any conveyance". The policy here involved is not so restricted. The insurance company, by the use of the much more inclusive language *in or on, including the platform, steps, or running board*, deliberately broadened the meaning of the word "passenger" beyond the limitations of the Cooley rule. The insurance company specifically extended the insurance coverage to circumstances that would have precluded recovery against public carriers, and deliberately extended its double indemnity liability beyond the limitations of the rule applicable in carrier cases.

REASONS FOR GRANTING WRIT.

1. **The Circuit Court of Appeals violated a constitutional right in reversing and reducing the judgment of the District Court, notwithstanding the verdict, and exceeded its authority in doing more than to order a new trial.**

Slocum v. New York Life Insurance Co., supra.

2. **The Circuit Court of Appeals invaded the province of the jury in substituting its own findings of fact.**

The court below conceded as established facts that decedent jumped upon the lower step of the car, and "while standing there he was carried to where Ishem stood"; "from the time he jumped on the train until he was carried to the point where Ishem stood, the decedent was standing with both feet on the lower step of the car and inside the vestibule, except for a small part of his body, which was outside"; while so standing apparently started to change hands with his overcoat or brief case; and that "decedent's overcoat or the small part of the decedent's body outside of the vestibule, brushed against Ishem and caused the decedent to loose his hold and fall". (R. 67.) These facts were necessarily found by the jury in its verdict in following the instructions given by the trial court.

Later on the court substituted a different conclusion of fact as follows:

> "His attempt to board the train and his fall therefrom were in reality parts of the same operation—an operation by which the decedent attempted, but unsuccessfully attempted, to attain the status of passenger." (R. 78.)

If the insured reached a position of stable equilibrium on the steps, even momentary—if he "was stand-

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ing there"—the conclusion of the Circuit Court cannot logically follow. There was implied in the verdict of the jury a finding that the insured did obtain a position of stable equilibrium on the steps of the car and that he was later thrown from the car by reason of being subsequently jostled by another person, and there was evidence to support this conclusion. The Circuit Court virtually made a new finding of fact different from and inconsistent with that found by the jury.

It is the prerogative of the jury to determine all questions of fact and the court shall not assume, directly or indirectly, to take from the jury such prerogative.

Walker v. New Mexico & S. P. R. Co., 165 U. S. 593, 17 Sup. Ct. Rep. 421;

Baylis v. Travelers' Ins. Co., 113 U. S. 316, 5 Sup. Ct. Rep. 494.

The decision of the Circuit Court of Appeals, considered on its merits, presents additional reasons for the granting of this writ.

3. An important question of general law is involved.

The wording of the insurance policy as quoted above is frequently if not usually found in general accident policies. The terms of accident insurance policies are being constantly broadened by insurance companies to cover additional risks, with double indemnity provisions as additional protection to the insured. Whether the language of such a policy should receive a strict and technical construction to defeat the policy or a liberal construction to support it, and whether the

double indemnity provisions of such a policy are subject to the same general rule of construction as other provisions of the policy, or subject to a different rule of construction, are questions of general public interest.

It is reasonable to assume that insurance companies in extending their policies to cover additional risks and inserting double indemnity provisions in broader terms and with fewer exceptions and limitations, purposely do so to make the policies more attractive to prospective policy holders. The question of construction of such policies—whether the language used should receive a liberal construction to support the policy, or a restricted construction which tends to negative the broader language selected by the insurance companies—is one of real public importance.

4. There is a conflict in the decisions.

As stated by the Circuit Court, there is a conflict in the authorities and the adjudicated cases dealing with the precise point are not numerous.

Most of the cases cited in the court's opinion were carrier cases involving claims for negligence.

Several Circuit Courts of Appeal have construed insurance policies containing somewhat similar provisions in considering cases involving accidents in public elevators. These decisions are in substantial conflict with the decision in the case at bar.

The Sixth Circuit (in the consolidated cases of *London Guarantee & Accident Co. v. Ladd; Preferred*

Accident Insurance Co. v. Ladd, 299 Fed. 562) held that insured was a passenger within a passenger elevator when he walked into an open elevator shaft. The court held that a double indemnity clause of an accident insurance policy must be construed by the same rules applicable to other provisions of the policy, and where the language is susceptible of two meanings it must be construed liberally in favor of the insured and against the insurance company which drew the policy.

The Third Circuit (in *Preferred Accident Ins. Co. v. Muir,* 126 Fed. 926) in passing on a double indemnity provision of a policy refused to adopt a restricted interpretation which would have precluded recovery to a passenger while on the car platform. The court held that insurance companies are presumed to incorporate in their policies all desired limitations covering undesirable risks and it is not for the courts to interpolate exceptions into the policies.

Policies frequently contain provisions excepting liability for injuries received in getting on or off a moving train (see Appendix), but the policy here involved contained no such exception. The court below has, in substance, read into the policy an exception exempting liability to insured when getting on a moving train until he shall first have reached a place of safety within the car.

The court below definitely rejected a plain, ordinary, or popular sense definition of the term "passenger" and adopted a restricted and technical definition of

the word. The Eighth Circuit (*Aetna Life Insurance Co. v. Davis,* 191 Fed. 343) approved an instruction giving to the words "'while a passenger in an elevator' the meaning they would in common acceptation be held to have".

One state court case, almost identical with the case at bar both as to the provisions of the policy and as to the facts, is in direct conflict. The insured there was held to be a passenger under a double indemnity clause when he stepped with but one foot on the platform of the moving train.

Fidelity & Casualty Co. v. Morrison, 129 Ill. A. 360.

5. The decision is in conflict with general insurance law.

The decision of the Circuit Court of Appeals is in conflict with the following rules of general insurance law sanctioned by the great weight of authority.

a. Insurance contracts, like other contracts, are to be taken and understood in their plain, ordinary, and popular sense.

Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 S. Ct. Rep. 379, at p. 381.

b. The language of an insurance contract is that of the company and in case of doubt the meaning of its own words should be resolved against it.

Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167, 44 S. Ct. Rep. 90, at p. 91.

Wherefore, it is respectfully urged that this petition for a writ of certiorari to review the judgment of

the Circuit Court of Appeals for the Ninth Circuit be granted.

Dated, San Francisco, California,
November 6, 1933.

ALLEN G. WRIGHT,
Attorney for Petitioner.

RANDELL LARSON,
WRIGHT & WRIGHT & LARSON,
Of Counsel.

(Appendix Follows.)

Appendix

Insurance policies containing provisions limiting liability, as suggested in the petition (page 12), are found in a number of cases. The following excerpts from a few such cases are illustrative:

1. (*Sawtelle v. Railway Pass. Assurance Co.*, 15 Blatchf. 216, 21 Fed. Cases 12,392.) "standing, riding or being upon the platform of moving railway coaches, or entering or attempting to enter, leaving or attempting to leave, any public conveyance using steam as a motive power, while the same is in motion, are hazards not contemplated by the contract."

2. (*Standard Life & Accident Ins. Co. v. McNulty*, 157 Fed. 224 (C. C. A. 8).) Double indemnity provided "if such injuries are sustained by reason of the wrecking of a passenger car * * * while the insured is actually within it riding as a passenger". The policy also provided: "This insurance does not cover * * * injuries sustained * * * while entering, or leaving, or trying to enter or leave, any moving conveyance."

3. (*Standard Life & Accident Ins. Co. v. Thornton*, 100 Fed. 582 (C. C. A. 6).) "The contract did not cover * * * death or disability resulting * * * from * * * entering or trying to enter or leave a moving conveyance using steam as a motor, or while riding on the platform or steps of any railway car."

4. (*Hull v. Equitable Acc. Ass'n* (Minn.), 42 N. W. 936.) "Standing, being or riding upon the platform of moving railway coaches (other than street cars), or riding in any other place not provided for the transportation of passengers, or entering or attempting to enter or leave any public conveyance using steam as the motive power,

while the same is in motion, * * * are hazards not contemplated or covered by this certificate."

5. (*Preferred Acc. Ins. Co. v. Muir,* 126 Fed. 926 (C. C. A. 3).) "If such injury shall be received by the insured while riding as a passenger in or on a public conveyance * * * then the amount to be paid * * * shall be double the amount which would * * * be otherwise payable * * *. The double indemnities accruing * * * shall not, however, be applicable to any injury * * * which may result from an attempt to enter or leave any of the conveyances therein specified."

6. (*London Guarantee & Accident Co. v. Ladd* (C. C. A. 6), 299 Fed. 562 (consolidated cases).)

One policy provided:

"The amount to be paid * * * shall be double * * * if such injuries are sustained while riding as a passenger in a car intended for the use of passengers, and being in or upon any passenger car on a railway using steam, cable, or electricity as a motive power * * *. Double payments * * * shall not apply to any accident or injury, fatal or otherwise, sustained while getting on or off or being upon the step or steps of any railway or street railway car."

The other policy provided:

"If such bodily injury is sustained by means as aforesaid (1) while the insured is a passenger and is in or upon any railway (or street railway) passenger car (including the platform, steps, or running board thereof) * * * the amount to be paid shall be double the sum which would otherwise be payable * * *. But any accident or injury, fatal or otherwise, sustained while getting on or off of any railway (or street railway) passenger car shall be covered only for single indemnity."